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SUPREME COURT OF THE UNITED STATES

No. 223

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION), ANACONDA MINING COMPANY (A CORPORATION), ANACONDA COPPER COMPANY (A CORPORATION), ANACONDA COPPER MINING COMPANY (A CORPORATION), MARGARET P. DALY, MARGARET P. DALY AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF MARCUS DALY, DECEASED, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, AND DANIEL J. HENNESSY, APPELLEES.

IN EQUITY.

BRIEF AND ARGUMENT FOR ANACONDA COPPER MINING COMPANY, a Corporation, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, DANIEL J. HENNESSY, MARGARET P. DALY, and MARGARET P. DALY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF MARCUS DALY, DECEASED, APPELLEES.

A. J. CAMPBELL,
L. O. EVANS,
Of Butte, Montana, Solicitors and of Counsel for Appellees.

A. J. SHORES,
C. F. KELLEY and
JOHN F. FORBIS,
Of Counsel.

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STATEMENT.

This is an appeal from the decision and decree of the Circuit Court of Appeals for the Ninth Circuit, affirming the decree and decision of the Circuit Court of the United States, Ninth Circuit, for the District of Montana, sustaining the demurrers of the above named appellees to the complainant's bill of complaint and dismissing the cause.

The facts stated in the bill of complaint in this case are substantially as follows:

It is alleged that on April 1, 1888, the appellant owned certain public lands in the State of Montana, which are described in the bill, comprising many thousands of acres, some of which were surveyed, and others of which were unsurveyed; that on said date there were growing and standing on said lands forests of pine and fir and other trees fit to manufacture into lumber, which standing timber was of the value of more than $2,000,000; that at the date of filing the bill said lands had for the most part been stripped of such timber, and except very small portions thereof were denuded of timber, without license or authority or permission of the United States or any one authorized to represent the appellant, and that in consequence of such spoliation the appellant has lost millions of dollars' worth of its property; that one Marcus Daly, now deceased, a citizen and resident of the State of Montana, did, on or about January 1st, 1889, determine to convert and appropriate to his own use all the merchantable and marketable timber growing and standing on the said lands without buying the same or obtaining any right or authority except as in the bill hereinafter stated; that in order to carry out his de-

signs, and to conceal his identity and to escape personal liability, and to deceive the public and the officers of the appellant, he, with the aid of certain named persons, on or about August 12th, 1890 organized, under the laws of the State of Montana, the Bitter Root Development Company of which John R. Toole, William Toole and James W. Hamilton were named as incorporators, and they, and Daniel J. Hennessy and William W. Dixon, were named as Trustees to manage the affairs of the Company for the first three months of its existence; that the capital stock of the corporation was fixed at the sum of $300,000; that said incorporators and trustees had but a nominal interest in the corporation, but certain of them were agents, and others attorneys, of said Marcus Daly and with him they conspired to denude said lands of their timber; that all of the stock of said corporation was subscribed for the use of and controlled by the said Marcus Daly, and that said named persons, together with Moses Kirkpatrick, William Scallon, Malcolm B. Brownlee, Michael Donohue, William L. Hoge, and Joseph V. Long, aided and assisted said Marcus Daly up to the time of his death in the work of spoliation which in pursuance of said conspiracy, had been planned; that said parties other than Daly participated in the profits, but to what extent it is unknown to the appellant; that such of the parties as are not made defendants to the bill are either dead, or out of the jurisdiction of the Court, or have no estate; that immediately upon the organization of the corporation, and under the corporate name thereof, said parties so named commenced the work of cutting and carrying away from said land, the growing and standing timber thereon, using at first several portable saw-mills, and later a large lumber saw-mill at the town of Hamilton, and carried

on said work with unremitting industry for several years; that at all such times the officers, directors, trustees and stockholders of said corporation acted for and in behalf of said Marcus Daly, as his agent, and had knowledge that said timber was being cut without right or authority from the public domain, *except as to a small fraction thereof as hereinafter* stated; that in pursuance of such fraudulent conspiracy, and concealment of same, the said conspirators, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations, obtain from the appellant licenses to cut certain timber on small portions of the tracts in the bill described, and under cover of such permits they carried away and manufactured not only the timber growing on the land, included in such licenses, but they wilfully and fraudulently entered upon large tracts of land adjacent thereto and cut and carried away the timber growing thereon, and afterwards cut and sold the timber to persons unknown to the appellant, but known only to said Daly and the officers and agents of said corporation; that they appropriated the proceeds of the same to their own use; that just when such sales were made, how much the proceeds were, to whom paid, in what proportion, and at what particular times the appellant is unable to say; that in further execution of said conspiracy, the said Daly and his associates, organized other corporations for the purpose of concealing their illegal acts and to make detection and proof of the same difficult, if not impossible; that on January 14, 1891, they organized a corporation known as the Anaconda Mining Company, with a capital stock of $12,500,000, divided into 500,000 shares; that on December 5 1891 the capital stock of said corporation was increased to $25,000,000; that at

the stockholders' meeting at which this was done, it appeared that no one of the incorporators or trustees that were named at the time of the incorporation had any substantial interest therein, and that on December 31, of that year, another meeting of the stockholders was held, at which it was voted to extend the term of existence of said corporation for forty years. At that meeting it appeared that Marcus Daly, either in his own person, or as trustee or by proxy, controlled over 700,000 of the million shares of the said capital stock, and in less than six months thereafter said capital stock was reduced from $25,000,000 to $1,000,000, and the number of shares from 1,000,000 to 40,000; that in furtherance of said conspiracy the said Daly, on April 27th, 1894, through his agents procured to be conveyed unto himself all the property of said Bitter Root Development Company; that in the deed of transfer it appeared that said Company, for and in consideration of one dollar, transferred all its property of every kind and description, real and personal, timber lands, timber cutting privileges and rights, etc., in fact everything belonging to the Bitter Root Development Company to Marcus Daly; that four days later Daly deeded the same property to the Anaconda Mining Company, for the express consideration of $1,442, 379.46; that said Daly did in fact receive said named consideration, the whole thereof being the result of the spoliation of the lands of the appellant as aforesaid; that the money so received by him belonged in fact to the appellant, but that in fact said consideration was not all paid in cash, but a portion of the same was in stock in said Anaconda Mining Company; but how much was cash and how much was stock the appellant is unable to state; that in furtherance of said conspiracy, on June 6th, 1895, the defendants, Kirkpatrick, Scallon

and Bromley, acting for and in behalf of said Daly, organized under the laws of the State of Montana, the Anaconda Copper Company, with an organized capital stock of $30,000,000, consisting of 300,000 shares, and for the first three months of its existence the said Kirkpatrick Scallon, Bromley, Donohue, Hoag, Hennessy and Long were named as trustees; that nine days thereafter the same persons organized under the laws of State the Anaconda Copper Mining Company, with an organized capital stock of $30,000,000, consisting of 1,200,000 shares with the same set of trustees to manage its affairs for the first three months of its existence; that in the execution of said conspiracy and for the purpose of complicating the situation, said Daly, through his agents, within one year and twenty-nine days, after having transferred his property to the Anaconda Mining Company, conveyed the identical property named in the deed to that corporation to the said Anaconda Copper Mining Company, for and in consideration of the sum of one dollar; that these several conveyances were made in the main in furtherance of said conspiracy, and for the purpose of so complicating the situation as to make detection difficult if not impossible; that the conveyance by the Bitter Root Development Company to Daly of all its property for the consideration of one dollar was fraudulent, and that the said Daly did in the name of the Anaconda Copper Mining Company carry on the same work of spoliation of the timber on said lands from the time of the conveyance of said property to said last named corporation, until the date of his death; that he continued to use the same means and the same mill, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same; that all of the

rporate assets of every kind and character of the
tter Root Development Company, either appeared
the stock of the other corporations, or was appro-
iated by Daly and his assistants to their own use
d benefit; but how much was carried over into the
d corporations, and how much was divided previous
the last deed, so referred to, and how much of the
operty of the appellant was converted by said last
med corporation, and how much thereof was appro-
iated by said company, and how much by Daly and
associates, it is impossible for the appellant to
te; that by reason of such spoliation carried on dur-
a period of about ten years, the appellant has lost
operty of the value of $2,000,000 and upwards, and
at the said Marcus Daly, and the other defendants
med in the bill, occasioned this loss by wilfully tres-
ssing on the lands of the appellant, without its con-
nt and in violation of the law, and that they appro-
iated and converted to their own use the trees and
mber growing thereon; that said defendants or some
them, have at all times had, and now have, pos-
ssion of the said saw-mill, and they have received all
oceeds from the sale of lumber, and divided the same
iong themselves; but by reason of the frauds so prac-
ed, and their concealment, and by reason of said
fendants having possession of all books of account,
is impossible for the appellant to set forth to a
eater extent the details of the conspiracy, or to show
en and by whom the particular acts of spoliation
re performed, or when and to whom the lumber was
d, or when and by whom the proceeds thereof were
eived; that owing to the sparsely settled condition
such lands, and the imperfect means of the appell-
t to patrol and protect the same, said frauds and
espasses were not discovered until a comparatively
ort time before the filing of the bill.

The bill contains this averment: "Your orator further shows that it has commenced several actions at law, in this Honorable Court, to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this Court, but that by reason of the frauds and conspiracies above set forth, and the complications which have resulted therefrom, no plain, adequate and complete remedy can be given said orator by said actions at law, and your orator is only relievable in a court of equity where matters of this kind are properly cognizable and relievable."

The bill further alleges that Marcus Daly died on the 12th day of November, 1900, and left estate of the value of about $12,000,000, in Montana and elsewhere; that a large portion of said estate was the result and proceeds of said illegal acts; that he died testate having named the defendant, Margaret P. Daly, his executrix; that his will was duly admitted to probate in the District Court of the County of Deer Lodge, in Montana, and letters of administration were duly issued thereon to the said Margaret P. Daly, and that she is now the acting executrix; that said Margaret P. Daly, under and by virtue of the terms of said last will, is now the owner of a large portion of said estate.

The bill then prays for equitable relief: First, that Margaret P. Daly ,both in her own person and as executrix, and each of the appellees, be decreed to hold in trust for the use and benefit of the appellant, so much of their estate, both real and personal, as shall have come to them directly from the proceeds of the sale of said timber; second, that the appellant recover from said appellees the profits and gains and advantages which they have received or made by reason of

said wilful trespasses and fraudulent conversion of said timber; third, that each of said appellees make a full and true discovery and disclosure of and concerning the transactions aforesad, and that an accounting be taken of all said dealings between the appellant and the appellees. That on said accounting the appellees be required to produce all licenses, permits, and all other documents of every kind and character which they may have received from the appellant, or by which they claim the right to enter upon any of said lands or to cut timber therefrom; fourth, that they account for the number of logs received by them and manufactured into lumber at their said saw-mill, or at any other mill owned or used by them; also the gains, profits, and advantages which have accrued to them from trespassing on said lands and converting said timber to their own use; fifth, that they account for all sums received on sales of such timber; sixth, that they set forth a list and description of all books of account, deeds, stock books, letters, papers, or writings relating to the matters aforesaid, or any of them, and that they deposit the same with the clerk of the court for the purpose of inspection by the appellant and for all other legitimate and usual purposes; that upon such accounting the appellees be required to pay to the appellant all money derived by them from their participation in the conspiracy aforesaid, with interest thereon, and for such further relief as pertains to equity.

There is no allegation in the bill of the insolvency of any of the defendants, or of their inability to fully respond to any judgment which might be obtained upon the facts set forth in the bill of complaint.

The bill waived any answer under oath (Trans. pp. 15, 16), and contained no special or other interrogatories.

To this bill separate demurrers were filed and presented in the Circuit Court, one by the Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, and another by Margaret P. Daly, and Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased. The two demurrers are practically identical, and are based upon want of equity in the bill, and upon the ground that the complainant therein, had a full, complete and adequate remedy at law for the recovery of damages for the alleged wrongs, and also a full, complete and adequate remedy at law for any discovery necessary in aid of an action at law, and that the bill does not show that a discovery is sought in this action in aid of any action at law brought against these defendants, and upon other general grounds stated in the said demurrers, and also upon the ground that the said bill is uncertain and indefinite in regard to the charges of fraud and conspiracy, and in various other respects as stated in the said demurrers. The circuit court sustained the said demurrers, and entered a decree dismissing the action, after appellant had elected to stand upon its bill and waived its right to amend, and upon appeal this action of the Circuit Court was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

We have not received appellant's brief in this Court upon this appeal, but in appellant's brief in the lower Court it was stated that the Bitter Root Development Company, Anaconda Mining Company, and Anaconda Copper Mining Company, which had been served, and did not appear in the action, have no offices or officers, and are not now in existence. This statement is an error in fact and upon the record in this case. The Anaconda Copper Mining Company appeared in the

action and filed its demurrer as above stated. The other defendants, than those who appeared and filed demurrers as above stated, were not served in the action and have not appeared therein. But there is no allegation in the bill or showing in the record that would justify a statement or conclusion that any of these corporations have no offices or officers or have been dissolved.

ARGUMENT.

We submit that even a cursory examination of the bill of complaint in this case will convince this Honorable Court that the complainant has no standing in equity, but has a full, complete and adequate remedy at law for the alleged wrongs set forth in the bill of complaint; and that the demurrers of appellees were well founded and were properly sustained by the lower court. We will briefly discuss the questions raised by said demurrers in the order in which they are discussed in the brief of appellant, filed in the lower court.

THE COMPLAINANT HAS A FULL, COMPLETE AND ADEQUATE REMEDY AT LAW IN AN ACTION FOR DAMAGES.

There are a great many general statements and allegations in the bill of complaint wherein charges of fraud and conspiracy are made; and it is repeatedly stated in terms that the complainant has no plain, adequate and complete remedy at law, and that the redress which could be afforded by a court of equity would be more efficient; but, stripping the bill of complaint of these general statements and allegations ,and

looking at the facts pleaded, it will readily be seen that complainant's action is one at law for trespass and conversion; and that the only difficulty, if any, which would confront the complainant in an immediate trial of the action before a jury, would be the obtaining of exact and detailed evidence of the alleged trespasses by defendants. The gist of the bill of complaint is simply that complainant is the owner of a large quantity of land which is, in the main, described by sections and quarter sections, in the District of Montana; and that the defendants have wrongfully and without right entered upon these lands and despoiled them of the valuable timber growing thereon. Complainant's remedy for these wrongs is plainly in an action for trespass and conversion. It is purely and simply a legal cause of action, in which the right involved is a legal one, and which the defendants are entitled to have tried by a jury. The fact that a *large* number of sections of land is involved, and that the trespasses have extended over a period of years, would in nowise change the nature of the action. The only difference between this and an action in which one quarter section of land is involved, and where but one trespass upon that quarter section had been committed, is that in this case more proof would have to be offered. If complainant has proof sufficient, there could be no difficulty in presenting it and having the redress granted in a court of law and before a jury. If complainant has not the proof (and that is the only obstacle in the way of an immediate trial, as appears upon the face of this bill) it can obtain this proof more readily through an action at law than through one in equity. The parties in an action at law would be the same—no more and no less than are joined in this action—in equity, although it is not clear from the bill how the defend-

ant Margaret P. Daly, individually, can be made a party to any action at law or in equity under the facts stated in this bill.

Appellant had a clear remedy under the facts stated in the bill of complaint in an action of trespass and conversion to recover damages based upon the value of the standing timber when taken, or if the trespasses were wilfully, knowingly and wrongfully committed, as is alleged in this bill of complaint, by an action in the nature of trover to recover of the defendants the full value of the timber after it had been manufactured into lumber.

Bolles Wooden Ware Co. v. United States, 106 U. S. 432, 27 L. Ed. 230.

It is admitted upon the face of this bill of complaint that appellant has a remedy at law to recover for these trespasses, or the value of the timber, but complainant denies in terms that such remedy is as plain, speedy or adequate as its remedy afforded in equity, but it is not shown in the bill how or why the remedy in equity would be more effective. From the bill, and as claimed by appellant's counsel in the lower court, the inadequacy of the legal remedy consists only of the trouble and difficulty of unraveling and bringing forth before a jury the methods adopted by the appellees in creating corporations, transferring their property from one to the other, and in various other ways seeking to cover up their tracks; and that these devices could only be brought to light through an inspection of the books and records of the corporations, the contention of appellant being that it would not be so difficult to obtain and produce such complicated evidence in a suit in equity, that is, that the practice of taking testimony

before a master would make the task of going through this mass of evidence much easier than before a jury; but the fact that the ordinary practice and procedure had in courts of law, and which would be available to appellant, is not as convenient in the view of counsel as that had before a master or in a court of equity, cannot be asserted as a ground, permitting a resort to equity and thus depriving the defendants of their constitutional rights to a trial at law before a jury.

It is not a case where it it necessary to bring in a large number of defendants in order to protect and adjust their rights among themselves as well as complainant's rights as to each of them. Under the allegations of this bill the defendants have no claims or rights to be adjusted as between themselves. Under the bill they were wrongful trespassers, each and all of them, and each directly responsible for the injuries sustained by complainant.

The doctrine is so well settled in England by the course and practice of the chancery court, and in this country by such course and practice, and also in the Federal Courts by direct inhibition by Act of Congress, that parties cannot be deprived of their right of trial by jury where there is an adequate and complete remedy at law; and that where the relief claimed can be obtained through an action at law, courts of equity will refuse to interfere, that we will consume but little of the time of the court in discussing the proposition. The reports of the cases decided by the Supreme Court of the United States teem with decisions of that court in cases of conversion, trespass, actions for damages for fraud and conspiracy and, in fact, cases of every conceivable kind, both in tort and on contract, holding that whenever a complete remedy can be obtained at law, and whenever a legal right is the basis of the main

cause of action a court of equity has no jurisdiction, but we will content ourselves with referring the court to a few of the decisions.

See:

Pomeroy on Equity Jurisprudence (2nd Ed) Vol. 1, Section 178;
Foster's Federal Practice, Sec. 12;
Bate's Federal Equity Practice, Sec. 188;
Buzard vs. Houston, 119 U. S., 347;
Insurance Company vs. Bailey. 13 Wall., 616;
Dowell vs. Mitchell, 105 U. S., 430;
Parkersburg vs. Brown, 106 U. S., 500;
Amber vs. Choteau, 107 U. S., 586;
Litchfield vs. Ballou, 114 U. S., 190;
Root vs. Michigan L. S. R. Co., 105 U. S., 189;
Thompson vs. Allen County, 115 U. S. , 550;
Texas Pac. Ry Co. vs. Marshall, 136 U. S., 393;
Hipp vs. Babin, 19 How., 278, 15 L. Ed., 633.
Dumont vs. Fry, 12 Fed., 21;
White vs. Boyce, 21 Fed., 228;
Alger vs. Anderson, 92 Fed., 696.

In Buzard vs. Houston, supra, the Supreme Court, in part says:

> "In the Judiciary Act of 1879, by which the First Congress established the judicial courts of the United States, and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.'
>
> "The effect of the provision of the Judiciary Act as often stated by this court is that 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plain-

tiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Hipp vs. Babin, 19 How., 271, 278; Ins. Co. vs. Bailey, 13 Wall., 616, 621; Grand Chute vs. Winnegar, 15 Wall., 373, 375; Lewis vs. Cocks, 23 Wall., 466 470; Root vs. Railway Co., 105 U. S., 189, 212; Killian vs. Ebbinghaus, 110 U. S., 568, 573. In a very recent case, the court said: 'This enactment certainly means something, and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule and to impress it upon the attention of the court.' N. Y. Guarantee Co. vs. Memphis Water Co., 107 U. S., 208, 215.

"Accordingly, a suit in equity, to enforce a legal right, can be brought only when the court can give more complete and effectual relief, in kind or in degree on the equity side than on the common law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in Watson vs. Southerland, 5 Wall., 74; or where an agreement procured by fraud is of a continuing nature; and its rescission will prevent a multiplicity of suits, as in Boyce vs. Grundy, 3 Pet., 210, 215; and in Jones vs. Bolles, 9 Wall., 364, 369.

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. Parkersburg vs. Brown, 106 U. S., 487, 500; Ambler vs. Choteau, 107 U. S., 586; Litchfield vs. Ballou, 114 U. S. 193."

In Insurance Company vs. Bailey, supra, the doctrine is briefly stated, as follows:

"Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this district. Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court without hesitation came to the conclusion that he could not, if his remedy at law was as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

"Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: 'That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury.' (Citing) Foley vs. Hill, 1 Phillipp, 399; S. S. 2 House of Lords Cases, 28; Fire Insurance Co. vs. Delavan, 8 Paige Chancery, 422; Alexander vs. Muirhead, 2 Dessausure, 162; 5 American Law Reg., 546."

In complainant's bill it is repeatedly stated that the remedy at law will not be adequate, and that for some reason that does not appear from the bill it could not there obtain as complete redress as could be afforded by a court of equity. Upon the same proofs which must be presented to a court of equity, a judgment could be obtained in a court of law. A decree in equity would not more readily than the judgment in the ac-

tion at law furnish the complainant a means of collecting a sum sufficient to compensate it for the injury done to its premises. We cannot conceive of a plainer case of legal right, or one where complainant's procedure at law would be simpler.

COMPLAINANT, PRESENTING ONLY AN UNLIQUIDATED CLAIM FOR DAMAGES, HAS NO STANDING IN A COURT OF EQUITY.

Before a party can come into a court of equity and seek relief he must reduce his claim, whether it be for unliquidated damages or upon contract, to judgment. In other words, his right to a recovery at all, whether it be in damages, for tort or a recovery upon contract, is a legal right, and one triable by jury. And this right must be determined, and a judgment entered before he can seek the interposition of equity.

See:

Swan Land and Cattle Co. vs. Frank, 148 U. S., 603;
Cates vs. Allen, 149 U. S., 451;
Scott vs. Neeley, 140 U. S., 106.

THE BILL CANNOT BE SUSTAINED ON THE GROUND THAT IT IS BROUGHT TO ESTABLISH A TRUST.

Upon the oral argument before the Court of Appeals, there was argued, and authority cited in support of, an additional ground for asking a reversal of the action of the lower court—that is, that the action is maintainable in equity for the purpose of declaring a trust in property possessed by defendants. But we submit

that the contention of counsel for appellant in this connection affords no ground whatever for equitable interposition in this cause.

In the first place under the allegations of this bill, the remedy of complainant is confined to damages for the trespasses, or if wilfully wrongful, to damages in an amount equal to the actual value of the manufactured lumber or other product in an action of trover. This rule of recovery in a case of trespass and conversion upon real property, or of trover, whether the conversion be of ores or of timber, or other portions of the freehold, is settled by the uniform decisions of all courts. It has never been held that the basis of recovery is the amount of gain or profit derived by the wrong-doer from the proceeds of the sale of the manufactured article, or of the converted property, in whatever form it may have been. No court has held, so far as we have been able to find, that the basis of recovery is the value of the property into which the wrong-doer may have invested the proceeds of his act of trespass or conversion. Under the decisions, if appellant under the facts stated in this bill, should recover the full value of the timber, when fully completed and manufactured into lumber, if the trespass was wilful; or if not wilful, the value of the timber in the trees; then the appellant will have recovered all that it could claim to be entitled to. To hold otherwise would be to hold that in every case of trespass, trover or conversion, that the remedy of the party complaining would lie either in law or in equity as he might elect.

In the second place, under the general rule, the application of the principle that equity will follow and declare a trust in the property for the benefit of the real owner, where money or other property has been mis-

applied, is confined to cases where the misapplication or misappropriation has been done by parties standing in some fiduciary relation to the wronged party.

Perry on Trusts, 5th ed., Vol. 1, Sec, 128, page 170, and cases cited.
Hawthorn vs. Brown, 3 Sneed (Tenn.), 462.

Counsel for appellant has cited two cases:

Newton vs. Porter, 69 New York, 163;
The American Sugar Refining Co. vs, Fancher, 145 New York, 552;

to the effect that the same principle will be applied where the trust arose through a tort. Even a cursory examination of these cases will disclose the fact that each is based upon the peculiar facts appearing therein, and they only affirm and strengthen our contention that the bill of complaint in the case at bar states no facts justifying equitable interference on the ground that complainant is entitled to follow the proceeds claimed to have been received from the conversion and sale of its timber.

In the case of Newton vs. Porter, 69 N. Y. 133, certain bonds had been stolen from plaintiff by parties who had sold them, and the proceeds had been invested in other securities. The parties who had stolen the bonds were absolutely insolvent. The plaintiff was without remedy except to follow the proceeds of the bonds into the purchased securities. The proceeds from the sale of the bonds were clearly identified and followed into the securities claimed. There was clearly no remedy at law, and the only redress which could be afforded plaintiff was to declare her to be rightfuly entitled to

the securities purchased with the proceeds of her property.

In the case of American Sugar Refining Company vs. Fancher, 145 N. Y., 552, the proceeds of a sale of personal property induced by fraud was followed by the vendor and identified specifically and beyond question in the hands of a voluntary assignee of the vendee. The vendee, the party committing the fraud, was hopelessly insolvent. There was no remedy at law or other redress that could be afforded the plaintiff than to permit him to follow his property into the hands of the assignee.

In each of the foregoing cases, as in all cases in equity, jurisdiction was maintained by the Court, solely upon the ground that there was no remedy at law, in each case the parties committing the wrong being hopelessly insolvent.

In the case of the American Sugar Refining Company vs. Fancher, supra, the Court emphasizes the fact that it would not proceed in equity, in the absence of a showing that no legal remedy was available and adequate, in the following language:

"When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, *where there is no adequate legal remedy* either on the contract of sale or for the recovery of the property in specie, or by *an action of tort* is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes or credits are *identified beyond question* in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in de-

nial of this power, which to our minds has any force, is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) *that nothing will be adjudged as proceeds except what can be specifically identified as such*, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a bona fide purchaser is found."

In the case at bar, complainant has a plain, speedy and adequate remedy at law in an action for damages against defendants. If the Daly estate profited by the tort, as is alleged in this bill, then the executrix can be joined with the others in the action for damages. Under the bill none of the defendants is alleged to be insolvent, and each of them is presumed to be fully able to respond to a proper judgment. Complainant can much more readily obtain full redress through a judgment at law for whatever damages it has sustained than in this action or any form of action in equity.

In the third place, conceding that complainant could disregard its remedy at law and appellees' right to a jury trial and proceed in equity, we submit that there is absolutely nothing in the bill of complaint which would sustain an action to declare a trust in or to follow the proceeds of complainant's property into any property of any of the appellees. There is not only an absence of the absolutely essential allegations which would identify and ascertain the property into which complainant claims the proceeds of its timber have been converted,

but in fact the allegations of the bill positively negative the possibility of any such identification or ascertainment.

In the bill, transcript, pages 11 and 14, paragraphs 16 and 17, it is stated that it is impossible to allege who appropriated the proceeds of the sales, when they were appropriated, in what way, or what became of them. The only allegation in the bill which charges that the proceeds of the trespasses went into any property now in existence is the following allegation, found on page 15 of the transcript:

"That a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator as hereinbefore charged."

This allegation refers only to the Daly estate.

Whenever the doctrine that a trust will be deemed created out of property purchased with funds obtained by fraud or funds that have been misappropriated or misapplied, the rule is laid down clearly that the first essential to the maintaining of the suit is that the lands sought to be impressed with the trust, must be clearly described and identified, and the money wrongfully used or misappropriated must be definitely traced and clearly proved to have been invested in the lands. Where the trust money has been mingled with other moneys so as to be indistinguishable and its identity lost, no trust in any specific property can arise.

This proposition is also clearly and repeatedly recognized in the New York cases above referred to, and cited by counsel for appellant.

See Pomeroy Eq. Juris., 2d edition, vol. 3, secs. 1048, 1051, 1058, 1080.

Ferris vs. Van Vechten, 73 N. Y., 113.

In Ferris vs. Van Vechten, supra, the rule is stated as follows:

"The money paid by the trustee for lands or other property or for choses in action sought to be subjected to the original trust must be identified as trust moneys, and this is clearly recognized in all the cases, and, in very many of them, this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is that when the trust fund has consisted of money and been mingled with other moneys of the trustee in one mass, undivided and indistinguishable, and the trustee has made investments generally from money in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investment."

In the case at bar, there is no claim made that it can be shown that any moneys derived from any of the alleged trespasses had been kept separate or could be identified or traced in any manner. In fact, the bill shows that the proceeds have been intermingled, and sent in every direction. In every case of trespass and conversion where the defendant has property at all, the same allegations might be made, and the action maintained in equity. All that would be necessary would be to allege just what is alleged in this cause, and that is that the defendant has property, has profited by the trespasses, and that therefore a portion of that property must have come from the proceeds of the trespass. Until complainant can present the Court with some facts as to who received the proceeds of its property, into what property or character of property the same was converted, and the other facts necessary to trace the complainant's funds or property into specific property held by defendants, surely complainant cannot contend that it is in a position to have a trust declared.

But counsel for appellant may contend that in order to carry out his theory of trusts it is necessary that he have a discovery in order to get the necessary facts. We respectfully submit, we have clearly shown by the authorities cited, that a bill for discovery alone cannot be maintained, and where, as counsel for appellant states in his brief in this case, the case is for relief and discovery, when the facts stated are insufficient to entitle the complainant to relief, the discovery must fail also.

Preston vs. Smith, 26 Fed. 885.
Venner vs. Atchison, T. & S. F. R. Co., 28 Fed. 581.
Everson vs. Equitable Life Assurance Co., 68 Fed. 258, and affirmed in 71 Fed. 570.
Cecil Nat. Bank vs. Thurber, 59 Fed. 913.
McLanahan vs. Davis, 8 How. (U. S.) 170.

In this connection, as upon other points urged in the case, the learned counsel for appellant contends that the bill should be sustained because it is apparent that the equitable remedy would be more efficient. Why it would be more efficient is not apparent from the bill. Surely, there would be no difficulty in proceding to judgment in the ordinary course of an action at law. There would be no difficulty in issuing execution and collecting that judgment. The doctrine sometimes stated in equity that a party can proceed there if the remedy is shown to be more complete and efficient than at law, does not refer to the fact that the procedure in equity generally may be clearer or more convenient, and has no reference to the convenience of parties or counsel in trying a case. It plainly means a more efficient remedy or result, and does not refer to the manner of reaching that result. If a party is enabled in the ordinary course

and procedure at common law to proceed and obtain and collect his judgment, he has no standing in equity, and the convenience or wishes of parties or counsel surely cannot be weighed against a constitutional right to trial by jury in any case like the present one, where legal rights are involved.

There is no peculiar condition presented by the facts in this case. There is no reason presented for asserting that under the facts presented by this particular case, for any reason, either general or particular, a court of equity should interpose. The same condition would arise, and does arise, in every action of trespass and conversion where a series of torts is charged. It is immaterial to the defendants whether their controversy with the Government, upon the matters presented in this bill, is determined in a court of law or equity, but to sustain the complainant's contention is simply to work an upheaval of the entire system of Federal jurisprudence, and to hold that the right to a trial by jury is but a memory.

THE BILL OF COMPLAINT SHOWS THAT THE COMPLAINANT HAS ELECTED TO PROCEED AT LAW TO RECOVER THE DAMAGES TO WHICH IT IS ENTITLED.

The bill of complaint alleges that the complainant has commenced actions at law to recover the value of the timber taken by defendants, and that said actions are still pending. It is not only apparent from the facts stated in the bill that complainant has a complete remedy at law, but the bill shows that complainant has recognized that fact, and at the time of filing this bill in equity it had brought, and then had pending, actions at

law to recover for the trespasses and conversions referred to in the bill. Even if equity had jurisdiction concurrent with law over these matters, after complainant had elected to proceed at law, it is precluded from going into equity. There is no reason shown in the bill, except the lack of evidence (and that could readily be obtained in a law action, as we will hereinafter show) why complainant does not prosecute these law actions to judgment; and certainly it could there obtain all that could be afforded it by a court of equity. But, in any event, by making its election of remedies, conceding that there was a choice between law and equity, the complainant, upon this fact appearing, is properly relegated to the actions at law.

Pomeroy's Eq. Jurisprudence (2d Ed.), Vol. 1, Sec. 179.

NO EQUITY JURISDICTION ARISES BY REASON OF THE FACT THAT MARGARET P. DALY, APPELLEE, IS SUED AS EXECUTRIX OF THE ESTATE OF MARCUS DALY, DECEASED.

As the second ground for equity jurisdiction in the lower court, we find the more than novel proposition advanced by counsel for appellant that because of the fact that courts of chancery exercise jurisdiction over executors and administrators in certain cases, and because of the fact that Margaret P. Daly in this case is sued as executrix, therefore full jurisdiction over the entire controversy was vested in the lower court.

In support of this contention counsel for appellant has cited a number of cases in which chancery courts

have exercised jurisdiction over controversies in which executors and administrators were involved. This jurisdiction arises partially from the fact that the executor or administrator is considered a trustee for the heirs, distributees and creditors. As stated in the citations relied on by appellant's counsel, and particularly in the excerpt from Pomeroy, Sec. 156, Vol. 1, Pom Eq. Jur., an executor is considered a trustee only for *legatees distributees,* and *creditors.* A court of equity has not jurisdiction of every case brought against a trustee, but only of cases which grow out of the trust relation and by and between the parties between whom the trust really exists.

In this case Margaret P. Daly, as executrix, is in no sense of the word a trustee for complainant or any other party, who presents a claim in tort for unliquidated damages.

In an action at law, brought upon a legal right, an executor or administrator has the same right of trial by jury as any other party, and the action must be prosecuted at law. In this case Margaret P. Daly is sued as executrix, as are the other defendants, for damages for trespass and conversion committed by her intestate. If complainant recover judgment in the actions at law, this judgment would then be a debt against the estate, and payable as other debts out of the funds in the hands of the executrix. To uphold the apparent contention of counsel for appellant in this regard would be simply to hold that every action, brought against an executrix or other trustee of any character, whether brought by the *cestui que trust* or by an entire stranger to the trust, as is complainant in this case, could be maintained in a court of equity; and that the courts of law are closed to executors and other trustees.

In this case there is no allegation that Mrs. Daly has concealed or misappropriated or misapplied any of the assets of the estate. The bill simply alleges, that as executrix she is now holding an estate of about twelve million dollars which was left by Marcus Daly, who was the principal party in the trespasses and conversions set forth in the bill of complaint. Even a creditor of an estate is not such a *cestui que trust* of the executrix as will enable him to maintain a bill in equity against the administrator for the establishing and payment of his claim, merely on the ground of trust relation, in the absence of charges of fraud, maladministration or non-administration, on the part of the executrix.

Walker vs. Brown, 58 Fed., 23.
And the same case, affirmed by the Circuit Court of Appeals, in the 63d Fed., 204.

Upon an examination of the authorities cited in this connection by appellant's counsel in the lower courts, without referring to them in detail, it will be seen that in every case where jurisdiction was exercised by a court of equity in a case where an administrator was a party, it was not upon the sole ground of the trust relation, but because of other conditions which conferred jurisdiction upon the court. For instance, in some cases discovery of assets; in others discovery and marshaling of assets and distribution among all of the creditors.

There is no charge of fraud against Mrs. Daly, as executrix. No discovery of assets is necessitated. She has ample funds to meet any judgment which might be recovered.

Under the judicial systems in force all the states of the United States, where probate courts are established for the purpose of administering upon estates of deceased persons and the distribution of the estates to

heirs, creditors and other persons entitled thereto, what ground or reason can there be for seeking relief against an executrix in a court of equity upon a cause of action which can be prosecuted to judgment in an action at law? When the judgment is obtained, the claim can be presented and must be paid in due course by the executrix.

In the present case it is alleged that the executrix Margaret P. Daly has in her possession assets in amount about six times the aggregate of damages claimed by the complainant. That property is in the jurisdiction of the probate court of Montana in which the executrix was appointed. The federal court could simply enter a decree for that amount against the executrix; it could not reach out and take from the probate court of Montana a dollar of the money with which to satisfy that decree. Either as a court of law or of equity the federal court could simply establish complainant's claim as a debt against the estate, and when it had done that its power would be exhausted under the facts alleged in this bill.

Byers vs. McAuley, 149 U. S., 608.

NO JURISDICTION IS SHOWN BY THE BILL OF COMPLAINT UPON THE GROUND THAT COMPLAINANT IS ENTITLED TO INVOKE THE AID OF EQUITY FOR AN ACCOUNTING.

It is also contended by appellant that the lower court had jurisdiction of this cause, and that the bill of complaint states grounds for equitable relief, because of the concurrent jurisdiction which the courts of equity exercise over matters of accounts and accounting.

In the first place, there is no relation between the complainant and the defendants, or any of them, which would support an action for accounting, either at common law or in equity. The defendants are charged in the bill as joint tort feasors. Complainant's action upon the facts alleged is for trespass and conversion or trover. To maintain an action for accounting either at law or in equity, there must be between the parties either a privity, by contract or consent, or a privity in law, such as a guardian, trustee or some other fiduciary relation. Against a defeasor or mere wrong-doer no action for accounting will lie. The fact that the controversy embraces a series of torts, each of which would have to be proven by separate and distinct evidence, would not alter the nature of the case.

Whitwell vs. Willard, 1 Met. (Mass), 216.
Stringham vs. Winnebago County, 24 Wis., 594.
Conklin vs. Busch, 8 Pa. St., 514.
Brinsmaid vs. Mayo, 9 Vermont, 30.

The cause of action attempted to be set forth in the bill of complaint in this cause arises wholly in tort, and this cause of action cannot by the election of complainant, or otherwise, be converted into a cause of action on an account at common law. See

Sandeen vs. Kansas City & St. Joe R. R. Co., 79 Mo., 278.
Albertson vs. Grier, 4 Houst (Del)., 541.
Atchison, Topeka & S. F. R. R. Co. vs. Wilkinson, 55 Kan., 83.
Western & Atlantic R. R. Co. vs. Mead & Co., 4 Snead, 107.

It is true, as stated by counsel for appellant, that among the subjects over which equity exercises concur-

rent jurisdiction with the law is that of account or accounting. But, as in any other case, where the remedy at law is compl te, equity cannot interpose. Wherever courts of equity have taken jurisdiction in matters of accounting, it has been for the reason that the accounting was mutual and intricate or, if upon one side only, great complexity or difficulty existed, that prevented a court of law or a jury from efficiently trying the same.

See:

Pomeroy's Eq. Jur. (2d Ed.), Sec. 1421.
Washburn Mfg. Co. vs. Freeman Wire Co., 41 Fed., 410.
Baker vs. Biddle, 2 Fed. Cases, 764.
Ely vs. Crane, 37 N. J. Eq., 157.
Paton vs. Clark, 156 Pa. St., 49; 29 At., 116.
Lafond vs. Lassere, 56 N. Y. S., 459.
Smith vs. Bodin, 74 N. Y., 30.
Badger vs. McNamara, 123 Mass., 117.
McCulla vs. Beadleston (R. I.), 20 Atlantic, 11.

In Washburn Mfg. Co. vs. Freeman Wire Company, 41 Fed., 410, supra, the rule is stated by Judge Thayer as follows:

> "A case does not become one of equitable cognizance merely because an accounting is prayed for or because it is proper or even necessary to take an account, as courts of law are competent to deal with suits of that character. * * * To authorize a decree for accounting, either as to profits or damages to which a complainant is entitled under the patent laws, the court must first acquire jurisdiction of the cause on some well defined equitable ground."
>
> Also see Hipp vs. Baker, 19 How., 278, 15 L. Ed., 633.

In each of the cases cited in appellant's brief in the courts below, where courts of equity have taken jurisdiction in cases of actions for accounting, it will be seen that the jurisdiction was based not upon the fact that the suit involved an accounting, but because in each case it was shown that an accounting could not be fairly and adequately had in a court of law, or that there was jurisdiction in equity, because of fiduciary relations between the parties, or some other well settled ground for equitable interposition.

In appellant's brief below, a quotation is given from the opinion in the case reported in 5 Pet., 495, to the effect,

> "That in all cases in which an action for account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted."

From an examination of the case itself it will be seen that this excerpt standing alone does not show the true meaning of the court. The decision clearly affirms the rule that it is not every transaction in which an account is to be adjusted which can be taken into a court of equity; but that some serious difficulty at law must interpose before recourse can be had to equity.

In the present case the acts complained of against the defendants were separate and distinct acts of trespass upon and conversions of complainant's property. The bill simply charges a series of torts extending over a period of years. Under no circumstances could the defendants be called upon to account to the complainant either in action at law or in equity. Complainant must present its proof and obtain its judgment for damages as for any other species of tort. But conceding that defendants could be called upon to account, what diffi-

culty would be presented in trying the case in a court of law. The proof could be presented by complainant upon a series of trespasses the same as for one. We cannot see why a jury could not intelligibly render a verdict upon proofs properly presented for trespasses amounting to two million dollars as for any less sum; for trespasses covering a period of years as for any less period, and for trespasses great in number as for one trespass. The fact that the account involved a great number of items, all on one side, would surely not present a case beyond the ability of a jury to cope with. The aggregate of the items could certainly be presented by witnesses, and nothing of difficulty left for the jury to do or determine.

In addition it is not alleged in the bill in this action that any accounting is necessary to enable the appellant to determine or prove the quantity of timber that is claimed to have been wrongfully cut from complainant's premises, or that the desired accounting would develop such proof.

But counsel for appellant seems to contend that the present case presents one of mutual accounts; and this is based upon the charge that the complainant had granted to the defendants licenses to cut timber on certain small portions of the tracts mentioned in the bill, and that instead of confining themselves to the ground covered by the licenses, the defendants entered upon other tracts adjacent thereto, and unlawfully took timber therefrom. How this presents a case of mutual account or mutual items of account we are unable to comprehend. As argued in a subsequent portion of appellant's brief, if the defendants cut any of the timber in question under the licenses or permits from the government, it is incumbent upon the defendants to set up and prove such permission, and that the cutting was done in accordance with

such permission. If, in this case, the defendants should prove that they had a right to cut upon certain of the lands described in the bill of complaint, this would simply except from complainant's right of recovery the lands covered by the licenses, and would leave the case in the same condition as if the defendants met complainant's charges and proofs by evidence that upon a portion of the lands described in the bill of complaint they had not cut timber or trespassed at all. It certainly would not be presenting any cross-items or charges against the complainant, or presenting in any manner mutual items or mutual accounts, or even credits in the ordinary sense of the term. Under the theory of complainant's counsel if the defendants should prove that the bill was entirely unfounded, and that they had not cut timber from any of the land mentioned in the bill, it would be presenting a case of mutual account.

THERE IS NO NECESSITY FOR A RESORT TO EQUITY IN ORDER TO PREVENT A MULTIPLICITY OF SUITS.

The fourth ground upon which appellant contends that the demurrers should have been overruled by the court below is that the bill shows that this action is necessary in order to avoid a multiplicity of actions at law.

In the first place, the bill alleges that actions at law have been commenced and are now pending to recover for these trespasses. From this allegation it must be presumed that the complainant has brought all the actions at law which can be brought, or which might be necessary to cover the trespasses complained of. As the complainant, before the filing of this bill, had brought all of the actions that it could bring against these de-

fendants or any of them, it is difficult to see how this action could avoid a multiplicity of actions at law so far as these defendants are concerned.

In the second place, under the allegations of this bill no more actions at law would be necessitated than in equity. These defendants are liable, if liable at all, under the allegations of this bill, as joint tort feasors, and they are so charged. It is alleged that the individual defendants conspired together and jointly committed the acts or contributed to the commission of the acts complained of. The corporations are charged in the same manner. Under the allegations they are all jointly liable for the damages claimed to have been sustained by complainant; and they could certainly be made joint defendants in an action at law. The fact that the defendants committed a portion of the trespasses through agents and employes, or through contractors or persons whom they induced to cut the timber and then purchased the same from them, or that the timber was cut and purchased from persons, or taken from persons, who were induced by defendants to believe that defendants had a right to cut the same, in nowise changes the situation. If these facts are true, the defendants are liable directly and personally for the timber cut through agents and through contractors, the same as if they had personally and individually committed the trespasses.

If it is not necessary to join these various contractors and agents and employes in a bill of equity, in order to completely dispose of the matter, then it will certainly not be necessary to join them in actions at law, or to bring separate actions at law against them. If it would be necessary to sue all of these various other individuals and persons separately or jointly in actions at law, then they are certainly indispensable parties to this or any other action in equity in order to completely dispose of the controversy.

The fact that the trespasses charged ran over a period of a good many years would necessitate but one action at law. The fact that the trespasses were committed upon numerous tracts of ground would make no difference, as the defendants could be sued in one action at law for all of the trespasses upon any or all of complainant's premises, whether on one or a thousand tracts, the same as they are attempted to be sued in this action in equity.

If it should be contended by counsel that all of the defendants could not be joined in one action at law because of the fact that their trespasses were during different periods of time and were not joint trespasses through all of the periods covered, then it is clear that all of said defendants could not be joined in one action in equity. We know of no rule which would permit the joining in an action in equity of a number of persons, who had at different times separately and not jointly trespassed, for the reason that such joinder would avoid an action against each of the defendants at law.

The cases cited by counsel for appellant in this action have no application, for the reason that this is not a case of one party having a right against a number of persons which could be determined as to all of the parties in one suit in equity, but at law would involve separate and distinct actions, and is not a case which involves a fund or property in which a great number of persons are interested; all of whom must be before the court in order to completely and effectually dispose of all contentions which might be raised as to the property or funds.

THE ALLEGATIONS IN THE BILL OF COMPLAINT AS TO THE GRANTING OF LICENSES OR PERMITS BY THE APPELLANT TO CUT UPON CERTAIN SMALL PORTIONS OF THE TRACTS OF LAND DESCRIBED, AND THE CUTTING OF TIMBER UPON OTHER LANDS UNDER COVER OF SUCH PERMITS, IN NOWISE TEND TO SHOW JURISDICTION IN EQUITY OF THIS CASE.

It is alleged in the bill of complaint that in pursuance of the alleged fraudulent conspiracy, and in order to carry out the same, and to conceal their actions, that the said Marcus Daly, aided by the other parties, under the name of the Bitter Root Development Company, at certain times during the years when said depredations were being carried on obtained from the appellant's agents licenses to cut upon certain small portions of the tracts described in the complaint, and under cover of such permits not only cut and carried away the timber growing upon the lands included in the licenses, but also wrongfully entered upon tracts of land adjacent thereto, and cut, carried away and converted the timber growing thereon, and converted the proceeds to their own use.

These allegations contain nothing which would justify a court of equity in assuming jurisdiction of this cause. And it is difficult to see what mission these allegations have in the bill. The appellant evidently does not intend to claim any damages for timber cut from the land covered by these permits or licenses. How the fact that the appellees had permits to cut upon one tract of land would aid them in any way in concealing or covering up their trespasses upon other tracts, it is difficult to see. There is no allegation or

claim that the appellant from its records could not readily ascertain upon just what tracts of land the appellees had a right to cut. If appellant's agents discovered that the appellees, or any one else, had taken timber from government land, there would have been no difficulty in such agents referring to the licenses or permits granted and ascertaining whether the cutting was entirely wrongful or was upon the tracts covered by the permits.

There is no allegation in the bill as to the character of these permits or licenses, or as to what was required of the appellees under them, but whatever their nature may have been, they certainly could not have given rise to any fiduciary relation between the parties obtaining them and the government, or any duty to account, or have given rise to any other situation which would justify the interposition of a court of equity.. Under the settled decisions of this court, and of many of the lower Federal Courts, everyone entering upon and cutting or carrying away timber from government lands is prima facie a trespasser, and the government could properly bring suit against him as such. If the defendant in that suit claimed a right to enter and take the timber under a special license and permit, such as is granted by the Secretary of the Interior, or under the general permit or license granted by the United States Statutes, in certain cases, for instance, such as that giving the right to cut from mineral lands, or for railroad purposes, etc., it would be incumbent upon the defendant to plead and prove his license or permission from the government and to justify his acts under it. Upon the facts stated upon the bill of complaint in this action, if the government should bring an action at law, or in the actions at law already brought, should set forth the same facts regarding the cutting

vision for the calling of parties as witnesses, and for the production of papers and documents, it was sometimes held that a court of equity would maintain a bill for discovery in aid of an action at law; but since the adoption of the provisions of Section 858 of the Revised Statutes of the United States, by which parties are placed upon the same plane as witnesses as any other persons, and the sections immediately subsequent to Section 858, providing for the production by witnesses of all books, papers and other documentary evidence, and of Section 724, providing for the production on notice of the books, papers, documents, etc. all necessary evidence and all information within the control of the opposing parties may easily and readily be obtained in the action at law. And since the adoption of these statutes the parties having full remedy in the law action, and there being no necessity for recourse to equity, the courts of chancery, and particularly the Federal Courts have clearly established the doctrine that a bill for discovery alone cannot be maintained.

Safford vs. Ensign Mfg. Co., 120 Fed., 480;
Brown vs. Swan, 10 Pet. (U. S.), 497.
Rindskoff vs. Platto, 29 Fed., 130;
Preston vs. Smith, 26 Fed., 885;
U. S. vs. McLaughlin, 24 Fed., 823;
Ex parte Boyd 105 U. S., 647;
Paton vs. Majors, 46 Fed., 210;
Field vs. Hastings & Bradley Co., 65 Fed., 279.
Home Ins. Co. vs. Stanchfield, 1 Dillon, 420;
Federal Case No. 6660.

In Safford vs. Ensign Mfg. Co., supra, the court, through Circuit Judge Goff, says:

"It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the Uuited States, because under Section 724, Rev. St., it is no longer generally needed. See Rindskoff vs. Platto (C. C.), 29 Fed., 130. * * * * From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would violate the doctrine laid down by Justice Field in Scott vs. Neely, supra, and would permit, by indirection the entertaining of a bill for discovery, although the trend of authority is that a pure bill for discovery cannot be maintained in the Federal Courts, because it is no longer necessary. For these reasons, I am of opinion that the demurrer should be sustained and the bill dismissed."

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In Brown vs. Swan, supra, the Supreme Court says:

"The jurisdiction of a court of equity in this regard rests upon the inability of the courts of common law to obtain or to compel such testimony to be given. It has no other foundation, and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness to prove what is sought from the conscience of an interested party."

In case of ex parte Boyd, 105, U. S., 657, this Court says:

"Now, it is of the essence of the jurisdiction of courts of equity in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction in the words of Story, Eq. Jur., Sec. 1495, that, 'Courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is of itself competent to grant the same relief; for in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending.' It follows, then, that although at one time courts of equity would entertain bills of discovery in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment these powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least become inoperative and obsolete. A bill in equity to compel the disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either, in a pending suit at law, would scarcely be resorted to, unless under special circumstances now, when parties are competent witnesses and can be compelled to answer under oath all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents important as instruments of evidence, when the court of law, in which the suit is pending is authorized by summary proceedings to enforce the same right."

In Preston vs. Smith, surpa, Mr. Justice Brewer said:

"*Finally*, it is claimed that the bill must be sustained because a discovery is sought. I do not understand that a bill can be sustained solely for the

sake of discovery; at least, that is the general rule. Indeed, bills of discovery are rarely, of late, resorted to. They have fallen (if I may be permitted to borrow a phrase from the political parlance of the day) into a condition of 'innocuous desuetude.'"

The present case presents no exception to this rule. So far as the individual defendants are concerned, they can be called as witnesses and compelled to produce their books, papers, documents, and whatever knowledge they may have that may be pertinent can be readily obtained in this manner.

So far as the corporation defendants are concerned, whatever knowledge they have must rest either with their officers, past or present, or in their books, papers, and documents. A corporation could have no knowledge outside of these sources. The books, papers and documents could be obtained upon demand and notice in the law action. The officers and agents, past or present, can be called as witnesses, and be compelled to produce whatever documentary evidence they may have.

If appellant's contention, that the prayer for accounting and allegations of necessity for discovery are sufficient to confer jurisdiction of this entire cause upon the lower court, be maintained, then every action at law, to recover for trespasses or other series of torts, could be brought and maintained in equity by simply asking for an account, and alleging that it was necessary that plaintiff be permitted to secure evidence from the defendants. Upon allegations as to the necessity for discovery there can be no issue or trial. Upon a bill properly framed, the defendants must make the discovery in their answer. All that need be alleged concerning the account, is that complainant needs and desires it. So

that, if this doctrine prevail, in this class of cases, and in fact all cases, even where the purest of legal rights are involved, parties could be deprived of their right of trial by jury, simply by an ingenious framing of a *so-called* bill in equity.

So that whether the element of discovery, under this bill, is considered as standing alone, or as claimed by counsel for appellant to be sufficient to confer jurisdiction of the entire controversy upon the court and to warrant the court in proceeding to grant all of the relief prayed for, we submit that the jurisdiction of a federal court of equity is in no wise aided by the allegations of the bill looking to a discovery.

Counsel for appellant has cited a number of cases to the effect that even since the passage of the Revised Statutes, Sections 724, 858, etc., the federal equity courts have compelled discoveries. Upon an examination of these cases it will be seen that in each case the main relief asked was based upon some well-settled head of equity jurisprudence; and the discovery sought merely incidental to the main relief asked; and the court simply held that, having obtained jurisdiction of the action in equity, and it being a proper case for equitable relief, the court would then proceed to grant discovery or any other incidental relief prayed for.

We have been unable to find a single authority, State or Federal, holding that for pure discovery alone a bill can be maintained.

(a). Again appellant cannot contend that it would be entitled to any discovery of facts under the bill in this action, and the bill cannot be sustained on that ground, for the reason that complainant, by its bill, specifically waives any answer by the defendants under oath, and no interrogatories of any character are specified or set forth in the bill, either in the bill itself or in

a note at the foot thereof. Any answer by the defendants, such as is called for by this bill, not being under oath, would be considered merely as a denial of the allegations in the bill, so as to put complainant on its proof. Such an answer would not be evidence in any sense. Under the Equity Rules adopted by this court, particularly numbers 40, 41, 42 and 43, it is plainly required that where a complainant desires to obtain a discovery of facts from the defendant, special interrogatories must be framed and directed to the defendants in the manner provided by those rules, and the rules plainly indicate that such interrogatories are not to be propounded to be answered otherwise than upon oath. Complainant, having failed to comply with those rules by propounding proper interrogatories, and having elected not to require any answer from any of the defendants which would be evidence in the case, has plainly shown its intention not to present this bill as a bill of discovery in this case, and has waived any right it might have had to a discovery. See:

Huntington vs. Saunders, 120 U. S., 78; 30 L. Ed., 580.
Patterson vs. Gaines, 6 Howard, 550; 12 L. Ed., 553.
Union Bank of Georgetown vs. Geary, 5 Peters, 99; 8 L. Ed., 60.
United States vs. McLaughlin, 24 Fed., 823.
Field vs. Hastings & Bradley Co., 65 Fed., 279.
Excelsior Wooden Pipe Co. vs. City of Seattle, 117 Fed., 140.
Tillinghast vs. Chace, 121 Fed., 435.

In Huntington vs. Saunders, supra, this court tersely laid down the rule as folows:

> "It is not a bill of discovery because the answer under oath of the defendant is expressly waived; no interrogatories are propounded to either of the defendants, no effort made to obtain from them or either of them by way of sworn answer anything which could be used as evidence in the case."

But under the general equity practice and in the absence of any such specific and binding requirement as we find in the equity rules of this court above referred to, the same rule is laid down, that the waiving of an oath to the answer waives the discovery.

> Harrington vs. Harrington, 15 Rhode Island, 341; 5 Atl., 502.
> McCulla vs. Beedleston, 17 Rhode Island, 20; 20 Atl., 11.
> Starkweather vs. Williams, 21 Rhode Island, 55; 41 Atl., 1003.
> Ward vs. Peck, 114 Mass., 121.
> Badger vs. McNamara, 123 Mass., 117.
> Sheppard vs. Akers, 1 Tenn. Chan., 326.
> Goodman vs. Bishop, 145 Illinois, 421; 34 Northeastern, 47.

And in addition under Equity Rules 40 and 41 the mere failure to prepare and present special interrogatories directed to the defendants is fatal to any right to claim discovery in this action. See:

> United States vs. McLaughlin, 24 Fed., 823.
> Daly vs. Young, Fed. Case No. 751.

(b). There is a further ground for denying the complainant's right to maintain this bill for discovery, and that is, that the defendants cannot be compelled to answer upon any matters or to disclose any evidence which

might subject them or might tend to subject them to, or in any way lay the basis for, criminal prosecutions or other proceeding which might result in the imposing of a penalty.

In this case the bill alleges (Trans. p. 14) that the acts of the defendant were "in violation of the laws of the United States, both civil and criminal." Outside of this specific allegation it is apparent upon the face of this bill that any evidence, which might be disclosed, or which would show or tend to show that the defendants had wrongfully entered upon the public domain and cut and removed timber therefrom, would subject them to criminal prosecution for such trespasses. Neither upon the witness stand, nor through the means of discovery in equity, could the defendants be compelled to incriminate themselves by answer or by production of any documentary evidence.

See:

Bates' Fed. Eq. Prac., Sec. 119 and Sec. 199.
Foster's Fed. Prac. (3d Ed.), Vol. 1, p. 290.
Boyd vs. U. S., 116 U. S., 616.
Lee vs. U. S., 150 U. S., 476 and 478.
Leggett vs. Postley, 2 Paige Ch., 599.
Livingstone vs. Harris, 3 Paige Ch., 528.
U. S. vs. Saline Bank, 1 Pet., 100.
Warren vs. Holbrook, 95 Mich., 195; 54 N. W., 712.

But counsel for appellant argues that where the criminal prosecution or liability to penalty is barred by lapse of time, the defendants cannot escape making discovery.

Upon the bill of complaint in this action it clearly appears that the acts complained of are crimes. The bill does not show when the acts were committed. In other words, it cannot be determined from the bill of complain-

ant that the statute of limitations has run as to the acts upon which discovery is sought, and there certainly can be no presumption indulged in that criminal prosecutions are barred.

Again, counsel for appellant argues that as to Margaret P. Daly, executrix, there can be no criminal prosecution or accusation. In some portions of the bill it is alleged (one allegation being found on page 30 of Transcript) that all of the defendants participated in these trespasses. But if nothing personal is intended to be charged against Mrs. Daly in the bill, we submit that the facts alleged are insufficient to compel any discovery or disclosure from Mrs. Daly, because it is not shown that she has any personal knowledge or books or other documentary evidence pertinent to the issue.

Certainly the other defendants, both individuals and corporations, would lay themselves liable to criminal prosecution if they were able to reveal facts as charged in the bill.

(3) *Complainant is not entitled to a discovery for the further reason that the bill is insufficient to show that the discovery is sought in aid of any action at law, conceding for the purpose of this argument that a discovery could be maintained in aid of such action.*

The bill alleges that law actions have been brought, and are now pending, against the defendants, or some of them, to recover for the trespasses referred to in the bill. But, while this allegation is undoubtedly sufficient to show that a recovery is being sought at law for the trespasses complained of, in order to obtain a discovery from any of these defendants it is necessary that the bill allege that said defendants are parties to the law actions, and that this action is ancillary to and in aid thereof.

1 Bates' Fed. Eq. Prac., Sec. 199, page 266.
Story's Eq. Plead., Sec. 259.

COMPLAINANT CANNOT INVOKE THE AID OF EQUITY BY REASON OF ANY FRAUD, MISREPRESENTATION OR CONCEALMENT ALLEGED IN ITS BILL OF COMPLAINT.

The learned counsel for appellant argues briefly that because of the jurisdiction exercised by courts of equity in cases of fraud, misrepresentation and concealment, the lower court should have taken jurisdiction of this action upon that ground.

In the first place, there is no allegation in the bill that any fraud, misrepresentation or concealment in any way enters into complainant's cause of action. The cause of action is in tort for damages for wilful, bold and naked trespasses and conversions. There is no charge that the defendants secured possession of complainant's ground, or were assisted or enabled in any way in the taking and conversion of complainant's property by means of any fraud or fraudulent statement or acts or misrepresentations or concealment. The only fraud, misrepresentation and concealment referred to in the bill was that the cutting was done through the cloak of corporations and various persons, and that the transactions were carried on in such a manner that it was made difficult for complainant to secure satisfactory evidence to support its cause of action.

This suit is not brought on account of the suppression of evidence, or of any fraud, misrepresentation and concealment in connection therewith, but is brought to recover for the wrongful trespasses upon, and the taking of plaintiff's property and the conversion thereof.

Even if a fraud or concealment entered into the cause of action; as stated in Buzard vs. Houston, 119 U.S. 347, it is not every case of fraud which is cognizable in a court of equity. Actions for damages sustained through

fraud; actions of deceit, and, in fact, every cause of action, whether it arises through fraud or otherwise, where the remedy is a legal one for damages, must be brought and prosecuted at law.

The instances, where equity takes jurisdiction of a cause arising through fraud, do not arise because of the fact alone that the causes of action arose through fraud, but are invariably where a party has through his fraud wronged another, and the matter is in such a condition that the wrong cannot be redressed through the ordinary procedure at law, but requires the assistance of a court of equity to reach and bring back the property or otherwise undo as far as possible the wrong complained of.

Further, the allegations of the bill as to fraud, misrepresentation and concealment, are too general and indefinite to sustain the bill upon this ground. While it is true that the evidence itself of a fraud need not be pleaded, still the bill must allege the specific acts or language which constitute the fraud, and not the mere unsustained conclusion of the pleader that fraud has been committed.

In this bill there is no statement as to what any of the defendants actually did which amounted to a fraud upon the government,—how, where or when it was done; but simply the allegation that certain results were accomplished in fraud of complainant's rights.

THE BILL IS SO GENERAL, UNCERTAIN AND INDEFINITE THAT IT PRESENTS NO GROUNDS FOR RELIEF OR DISCOVERY IN EQUITY.

Certain objections, upon the grounds of uncertainty and insufficiency, are presented against the bill in this case, by the demurrers filed, and while it is clear that

the demurrers in this respect are well founded, and that the bill in many respects is insufficient and uncertain, we regard the propositions heretofore argued, so clearly decisive of our contention, that under this bill, complainant has no standing in a court of equity, that we do not feel justified in arguing these objections at length.

But we respectfully submit that a mere reading of the bill will disclose that no attempt is made to allege how any of the alleged acts of defendants were fraudulent or how complainant was injured by any of the allegsd acts of conspiracy or fraud, or how any acts of the defendants, in organizing corporations or otherwise, complicated the situation or made detection difficult or impossible, or concealed from complainant any facts in the case. Nor is it sufficiently averred how the alleged frauds were committed or what means were used to conceal them. There are no facts alleged in the bill which would enable the Court to determine for itself that frauds had been committed or a conspiracy organized and carried out which resulted in any injury to complainant. In fact it appears from the bill that whatever difficulty complainant may be laboring under, is not due to any acts of defendants, but to complainant's delay and negligence in not sooner asserting its rights, if any it has, and in not sooner obtaining and preserving evidence with which to prosecute any violation of those rights. The bill is also uncertain and insufficient in that it shows that from portions of the lands described in the bill, defendants have the right to cut timber by reason of direct permits and license issued by the complainant. Knowledge of what these permits are must lie with complainant, and as complainant shows by the bill that it does not intend to dis-

pute the permits or rights granted thereunder, we submit that the bill should show what lands should be excepted from it, and should be confined to premises concerning which complainant alleges it has a cause of action.

We respectfully submit that irrespective of the jurisdictional defects in said bill, that the said demurrers were well founded, because of the uncertainty and insufficiency of the bill.

It is no answer to the plain truth of the charge, that this bill is indefinite and uncertain in the respects pointed out above and in the particulars heretofore urged in our discussion of the failure of this bill to state a cause in equity, either on the ground of fraud or on the ground that it is brought to establish a trust, or any of the other grounds heretofore discussed in this brief, to say that the bill shows that it is necessarily indefinite and uncertain because of complainant's lack of knowledge and proof as to the various matters charged, or that complainant in part by this bill is seeking to discover the details and facts which it lacks in order to allege a good cause. If discovery were properly sought by this bill upon these matters it might plausibly be claimed that such certainty of allegation, as is ordinarily required, should be dispensed with, but complainant, as we have above shown, does not present any right to a discovery under this bill. If it had any such right at any time it has clearly waived it by waiving an answer under oath and failing to present interrogatories, and it has no right to a discovery for the other reasons heretofore urged. Therefore the bill, if a bill in equity at all is for relief alone and is fatally defective in not stating clearly and precisely the facts essential to make out its cause. See:

Story's Eq. Pleadings, Secs. 253, 257.
Tillinghast vs. Chace, 121 Fed., 435.

This ground of demurrer, that is that the bill was uncertain and insufficient for the various particulars given in the demurrers, was urged before and sustained by the Circuit Court, together with the other grounds of demurrer. Complainant was by the Court given five days within which to further plead or consider as to further action herein. (Transcript, page 26.) After the expiration of the five days, complainant having elected to stand upon its bill and not amending, a decree was entered dismissing the bill. (Transcript, page 27.)

It therefore appears from the record that complainant had a full opportunity to cure these defects in the court below, but elected to waive its right to amend and stood upon its pleading. A decree of dismissal was therefore proper upon this ground of demurrer alone, and for this reason, if for no other, the action of the lower court should be by this court affirmed.

In conclusion, we respectfully submit that the only resemblance which the bill of complaint in this case bears to a bill sustainable in equity is in its form and in the ingenuity displayed by counsel in the frequent use of terms encountered in equity practice, such as "fraud," "account," "trust," etc., and stripping the bill of all unnecessary phraseology and verbiage, and looking only to the facts alleged the controversy presented is reduced to a simple, naked, concrete proposition of law. It presents a claim or money demand for unliquidated damages growing out of wilful trespasses and conversions supportable in a court of law alone. Complainant has recognized this by already filing its law actions. There is no equity presented; no reason for asking the interposition of a court of equity, and we

respectfully submit that the action of the Circuit Court in sustaining the demurrers, and dismissing the bill, and the action of the Circuit Court of Appeals in affirming the action of the lower court were proper, and should be approved and affirmed by this Honorable Court.

Respectfully submitted,

A. J. CAMPBELL,
L. O. EVANS,
Of Butte, Montana, Solicitors and of Counsel for Appellees.

JOHN F. FORBIS,
C. F. KELLEY and
A. J. SHORES,
Of Counsel.